

RRT Bulletin

The Refugee Review Tribunal decisions digest

This bulletin covers recently published Tribunal decisions. The decisions summarised represent a cross-section of published decisions of the Tribunal. Selected summaries of High Court, Federal Court and Federal Magistrates Court judgments, of interest to the Tribunal, are also included.

The Refugee Review Tribunal shall not be liable for any reliance by any person on the summaries contained in this Bulletin. Each summary provides a guide only to each decision and should not, under any circumstance, be used as a substitute for the full text of a decision.

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Afghanistan

V05/17973

12 October 2005, Melbourne

Ms S Muling, Member

AFGHANISTAN - RACE - HAZARA - RELIGION - SHIA MUSLIM - FURTHER PROTECTION VISA - The applicant was previously recognised as a refugee on the basis that he had a well-founded fear of persecution from the Taliban due to his race and religion as a Hazara Shia Muslim. He claimed he was still at risk as the Pashtuns had treated Hazara Shias badly many years before the Taliban and their belief would not change regardless of the interim government. He also claimed there was instability and lack of security in areas both in and outside the capital of Kabul, and that the Taliban were reforming and were still armed. The applicant claimed that as the Taliban held power in outer areas they were able to continue to persecute Hazaras, and that although there had been changes, they had not substantially improved security for him.

Held: Decision under review set aside.

Having regard to independent information, the Tribunal acknowledged there had been considerable changes since the applicant left the country. However it noted there was evidence the security situation was far from improving but was in fact deteriorating. The Tribunal noted the presence of the International Security Assistance Force in Kabul and the United States and its allies in other parts of the country and the elections in October 2004 and September 2005. It found, however, that there remained an absence of effective central government and at the local level no protection was available. The Tribunal was satisfied there had not been a substantial, effective and durable change since the period when the applicant was initially recognised as a refugee, following the changed circumstances after the defeat of the Taliban. Accordingly, it was satisfied that the applicant had a well-founded fear of persecution.

N05/52139

10 November 2005, Sydney

Ms P Leehy, Member

AFGHANISTAN - RELIGION - SECULARISED RETURNEE - POLITICAL OPINION - PRO COMMUNIST - FURTHER PROTECTION VISA - The applicant from Kabul had previously been recognised as a refugee in Australia on the basis that he had a well-founded fear of persecution from the Taliban who perceived him to be a communist. He claimed that he was still at risk from the Taliban and former Mujaheddin because of his father's association with the former communist government. The applicant also claimed that he was at risk from religious fundamentalists because living in Australia would confirm their belief that he was an infidel and a supporter of the West.

Held: Decision under review set aside.

The Tribunal accepted that the applicant's father had an honoured status under the former communist regime and was a member of the People's Democratic Party of Afghanistan. It accepted that the applicant supported some of the core tenets of the communists. Relying on independent evidence the Tribunal accepted that attacks by suspected Taliban continued in Kabul. It found there was a real chance that the applicant would be seriously harmed for reasons of his imputed political opinion by the Taliban and former Mujaheddin who strongly opposed the former communist regime. In addition the Tribunal found the fact that he had spent several years in the "liberal" west was likely to exacerbate any hostility towards him including from religious fundamentalists. Given the general state of insecurity, lack of central control and lack of order throughout the country, the Tribunal found that the applicant would not receive state protection. Accordingly, it was satisfied that his fear of persecution was well-founded.

Bangladesh

N05/51627

27 October 2005, Sydney

Mr A Jacovides, Member

BANGLADESH - RACE - HINDU - HARASSMENT - EXTREMIST MUSLIMS - The applicant feared persecution as a Hindu who had been targeted by the Muslim community. He claimed that he had been kidnapped by a group of extremist Muslims in his village and held for several days. The applicant claimed that during that period he was forcibly circumcised and sexually harassed. He also claimed that land belonging to his mother was occupied by Muslims who demanded she sign documents saying that she had sold her land and property to them. The applicant claimed that such harassment of Hindus was common in Bangladesh. He claimed that the Hindu community in Bangladesh suffered ongoing harassment from the Muslim community without access to protection by the State. The applicant also argued that the government of Bangladesh participated in the persecution of Hindus.

Held: Decision under review affirmed.

The Tribunal accepted the applicant's claims of assault and intimidation but found that it was confined to a particular place and time and his fear of similar harm was not well-founded. It noted that there were ongoing tensions between the Hindu minority and Muslim majority with occasional outbreaks of inter-communal violence, particularly during elections. Referring to independent information the Tribunal found that the authorities had demonstrated a willingness and ability to intervene and protect the Hindu community at times when inter-communal violence seemed possible. It noted that the authorities were not always successful in preventing communal violence or individual attacks against Hindus. However, it was satisfied that the applicant would not be denied access to protection or differentially treated by the authorities because he was a Hindu. Accordingly, it found that the applicant's fear of persecution was not well-founded.

China

N05/51200

17 October 2005, Sydney

Ms L Nicholls, Member

CHINA - RELIGION - CHRISTIAN - UNDERGROUND CHURCH - HARASSMENT - DETENTION - The applicant feared persecution as a Christian who did not wish to become a member of the official and registered churches. He claimed he was born into a Christian family and had been participating in underground Christian activities. The applicant claimed that his behaviour was not allowed by the government and at one point he had been detained for several weeks. He claimed that he had travelled around and worked in many businesses and that he also spread the Gospel, distributed materials and set up Bible study groups. The applicant claimed he was supported by other members of his underground church and had to move frequently to avoid the attention of the Public Security Bureau. He claimed that in Australia he attended church and participated in church services and other activities. The applicant feared that if he returned to China he would be unable to participate in religious activities without restriction.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a Christian, but did not accept that a person of Christian faith would always face a risk of persecution for that reason. It noted that much depended on the particular circumstances and profile of an applicant. The Tribunal accepted that the applicant moved from place to place after his period of detention, to avoid suspicion for his Christian activities. It also accepted that he was detained and spent several weeks in detention, where he was physically mistreated. The Tribunal accepted that although the applicant continued his Christian activities following his release, he was hampered by the restrictions on the free expression of his religious beliefs. It accepted that he may be at risk of further detention and harassment if he continued his activities. The Tribunal found that if the applicant returned and became a member of an officially sanctioned Christian church, the only reason would be to avoid persecutory conduct. Accordingly, it was satisfied that his fear of persecution was well-founded.

N05/52339
16 November 2005, Sydney
Mr R Wilson, Member

CHINA - RELIGION - PARTICULAR SOCIAL GROUP - POLITICAL OPINION - FALUN GONG PRACTITIONERS - The applicant feared persecution arising from his adherence to the practice of Falun Gong. He claimed that he commenced Falun Gong in China and on arrival in Australia had practised by himself before joining a local group. The applicant claimed he had also participated in demonstrations and protests and had distributed leaflets and other publications. He claimed that he told people about Falun Gong and that there were Chinese spies in Australia who placed Falun Gong practitioners under surveillance. The applicant claimed that if he returned he would let people know “the truth about Falun Gong” and about people being persecuted. He claimed he would prefer to practise in public, but if he did so, he would be arrested by the authorities. The applicant claimed he would also persuade his parents and relatives to practise Falun Gong and would face arrest for this.

Held: Decision under review set aside.

The Tribunal accepted the applicant’s claims and, having regard to all the evidence, found that he was not motivated to commence the intense public practice of Falun Gong in order to create a *sur place* claim. It found that his actions were motivated by his meeting fellow practitioners and his earnest desire to learn and practise Falun Gong. The Tribunal found that the applicant also wanted to support Falun Gong practitioners in China by protesting against the Chinese government. It found that he would continue the practice of Falun Gong with other practitioners, would try to persuade his family to become practitioners and would disseminate information and ideas in China. The Tribunal was satisfied there was a real chance that the applicant would be persecuted simply because he was a Falun Gong practitioner. It was satisfied that his political opinion, religion and particular social group was the reason for the persecution he feared. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.

Fiji

N05/52057
7 November 2005, Sydney
Ms P McIntosh, Member

FIJI - RACE - INDIAN - ROBBERY - VIOLENCE - The applicant feared persecution arising from her Indian ethnicity as well as her age and her state of health. She claimed that Fiji Indians faced harassment, robbery and violence designed to intimidate them. The applicant claimed that she would have nowhere to live if she had to return and that she was old, uneducated and unable to earn an income. She would end up “begging on the road”. The applicant claimed that indigenous Fijians bashed and robbed old women living alone, especially if they were Fiji Indian. She also feared sexual assault and claimed the police were racist and would not protect her. The applicant claimed that she had not stayed in touch with her relatives and knew nothing about their current circumstances.

Held: Decision under review affirmed.

The Tribunal found that the applicant left Fiji because of family problems and that she had been intending to return. It found that she changed her mind because of the breakdown of a family relationship and because there had been a coup and she had heard of the dangers facing Fiji Indians at that time. The Tribunal noted the claim that the applicant had nowhere to live in safety in Fiji, but did not accept that she had had no contact with her relatives since coming to Australia several years ago. It also found that violence against Fiji Indians on the basis of ethnicity had declined significantly since the coup in 2000 and that there was no significant trend of ethnically motivated violence against Fiji Indians by indigenous Fijians. The Tribunal accepted that criminal activity was a problem but was satisfied that the reason was the greed of the perpetrators rather than the race of the victims. It was not satisfied there was a real chance that the applicant would be denied police protection from any harm she may face. Accordingly, the Tribunal found that her fear of Convention-based persecution was not well-founded.

V05/18066
10 November 2005, Melbourne
Mr A Gentile, Member

FIJI - RACE - INDIAN - PARTICULAR SOCIAL GROUP - INDIAN WOMEN - The Indian applicant feared persecution arising from her Indian ethnicity. She claimed that local landowners blocked the road on a daily basis for several hours when she and her family were on their way to the temple or to work. The applicant claimed they also demanded extra money from tenants. She feared she would be treated with cruelty or violence by ethnic Fijians, that she and her family would be evicted from their land by local land owners and she would be unable to earn a livelihood. The applicant stated that law and order were still not in place as occasional harassment and increased crime based on race was compounded by inadequate police protection. She also claimed that she had been raped at the resort where she worked and this was actually the main reason she left Fiji.

Held: Decision under review affirmed.

The Tribunal was prepared to give the applicant the benefit of the doubt and accept that she was raped. However, it found that the harm suffered by the applicant was not for reasons of her membership of a particular social group. The Tribunal noted that the information she provided pointed to criminal motivation and self interest by the perpetrators and the opportunity to harm her as an individual. It found that there was no Convention reason for the harm suffered. The Tribunal accepted that ethnicity was an important issue in Fijian society and that tension existed between the indigenous and Indo-Fijian communities. It accepted that ethnic discrimination remained a serious problem, but was not satisfied that it was of a sufficiently serious nature to amount to persecution of Fiji Indians. The Tribunal found that adequate state protection would be available to the applicant and that her fear of persecution was not well-founded.

India

N05/52050
10 November 2005, Sydney
Mr R Inder, Member

INDIA - RACE - HINDU - RELATIONSHIP WITH MUSLIM GIRL - BANK FRAUD - The Hindu applicant feared persecution arising from his relationship with a Muslim girl and his involvement in a fraud racket involving a bank. He claimed that he fell in love with the girl but her family opposed him because he was Hindu. The applicant claimed that her relative was in the Communist Party of India (Marxist) (CPIM) and he was called to their office and warned not to maintain the relationship. He claimed that when he continued to meet the girl, he was badly beaten on the orders of her relative. The applicant also claimed that he had travelled with friends to Mumbai where they were told to open a bank account in another name and to deposit various amounts several weeks later. He stated they were to receive thousands of rupees each. The applicant claimed that when they went to withdraw money he and his friend were arrested and gaoled. They were told this was part of a large fraud in which bank staff were involved. The applicant claimed that after his relative arranged his bail he was harassed by the family of the friend who was still in gaol in Mumbai.

Held: Decision under review affirmed.

The Tribunal accepted that the applicant had a relationship with his girlfriend which was opposed by her parents, but that he had not been in contact with her for many years. It accepted that he was beaten by associates of the girl's relative, but was not satisfied that this was at the hands of members of the CPIM or that it was for a Convention reason. The Tribunal was satisfied there was not a real chance that the girl's father or the CPIM would seek to harm him if he returned. It accepted that the applicant and another person were involved in an attempted bank fraud in Mumbai and were both arrested, although the applicant was released on bail due to a relative's efforts and the engagement of a lawyer. The Tribunal also accepted that the friends of the applicant's accomplice may harbour some resentment against him as he was able to be released. However, it was not satisfied that the applicant would therefore suffer persecution for a Convention reason. The Tribunal found that if he had a subjective fear of serious harm he would be able to seek police protection and accordingly, his fear of being killed if he returned was not well-founded.

N05/52010
16 November 2005, Sydney
Mr A Jacovides, Member

INDIA - RELIGION - MUSLIM - POLITICAL OPINION - MUSLIM ACTIVIST - The applicant feared persecution as a politically active Muslim who was a member of the Indian Union Muslim League and the National Development Fund (NDF). He claimed that he was involved in political activities with the Muslim community trying to elevate the status of Muslims in society. The applicant claimed that whilst travelling to work he was attacked by a group of Hindu extremists who attempted to kill him. He claimed that the colleague who took him to hospital was later murdered. The applicant claimed that during the same period Hindu extremists also burned his business and harassed his family. He claimed that just before the attack he was harassed by Hindu extremists who objected to him recruiting members for the NDF and told him to stop participating in political activities. The applicant claimed that he reported the incident to the police but no arrests were made.

Held: Decision under review set aside.

The Tribunal accepted the applicant's claims that he would be targeted by Hindu extremists throughout India because he had been and intended to be politically active with Muslim groups such as the NDF. It found that communal violence was a widespread problem with all sides implicated in human rights abuses, including the authorities. The Tribunal found that politically active Muslims were being targeted by opponents and faced life-threatening harm by Hindu extremists, without the benefit of protection by the State. It found that the applicant was at risk of life-threatening harm by political opponents because of his political activities with groups promoting the empowerment of Muslims. The Tribunal found that the authorities would not be able to protect the applicant from politically motivated attacks and that his fear of persecution was well-founded.

Iraq

V05/18058
12 September 2005, Melbourne
Ms G Hamilton, Member

IRAQ - RELIGION - SHIA MUSLIM - POLITICAL OPINION - PRO COALITION FORCES - FURTHER PROTECTION VISA - The applicant was previously recognised as a refugee on the basis of a well-founded fear of persecution by the Ba'athist regime for reason of being an identified opponent of local Ba'athist officials and for illegally departing Iraq. He claimed he was suspected of killing a member of the Ba'ath Party with whom he had argued. The applicant claimed that he also continued to fear persecution by former Ba'athists as a returnee from a western country.

Held: Decision under review set aside.

The Tribunal found that Iraq remained extremely unstable and the security situation dangerous. It was not satisfied that the Iraqi forces and foreign troops were able to provide adequate protection to the wide range of citizens at risk from former Ba'athists and their network of supporters. In addition, it found that there was no safe way of moving around Iraq and that travellers risked being harmed as suspected foreign visitors or coalition forces. Accordingly, the Tribunal was not satisfied that the circumstances in connection with which the applicant was granted a protection visa, that is, circumstances in which a real or imputed anti-Ba'athist opinion could lead to serious harm, had ceased to exist. In addition, the Tribunal was satisfied that as a returnee from Australia the applicant still faced a real chance of persecution due to an imputed pro-occupation or anti-nationalist political opinion. It found that the Iraqi authorities were unable to protect him from such harm. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution.



Nepal

N05/51625
13 September 2005, Sydney
Ms C Long, Member

NEPAL - RELIGION - CHRISTIAN EVANGELIST - The applicant feared persecution as a Christian who had converted from Hinduism and believed he should share his faith. He claimed he spread his religion and converted a number of Hindus. The applicant claimed he would get no protection in Nepal because activities against Hinduism were not allowed. He feared that Hindu extremists protected by the authorities would harm him. The applicant claimed he had been attacked and threatened by Hindus and was detained by the authorities for several days. The applicant claimed that the Maoists had threatened him a week before he left and he thought that he could be abducted. He claimed he could not report that incident or other incidents to the police because that would mean he would be killed by the Maoists.

Held: Decision under review set aside.

The Tribunal accepted that the applicant was a committed Christian evangelist who had become involved in such activities with a Christian group in Australia. It accepted that he would continue these activities if he returned to Nepal. The Tribunal accepted that the applicant had been engaged in Christian preaching/evangelist activities in his country for several years. It accepted that he left his country because he suffered the harm he claimed from authorities and Maoists, in particular "spreading the word of God". The Tribunal noted that practically speaking, the applicant could enter and reside in India. However, having regard to independent information, it found that he would still be at risk of persecution, without the availability of adequate protection, for his Christian evangelist activities in India. Accordingly, the Tribunal found that the applicant's fear of persecution for reasons of his religion was well-founded.



Vietnam

V05/18047
24 November 2005, Melbourne
Ms W Boddison, Member

VIETNAM - RELIGION - CATHOLIC - BAD FAMILY BACKGROUND - PARTICULAR SOCIAL GROUP - THOSE WHO SEEK PROTECTION IN OTHER COUNTRIES - The applicant feared persecution on the basis of her bad family background due to her family's connections with the former regime, her Catholic faith and her membership of the particular social group of Vietnamese nationals who had sought protection in other countries. The applicant claimed that she was ill treated at University and had to pay a bribe in order to gain employment in a government store which was shortly terminated because she was Catholic. The applicant further claimed that if she returned she would be targeted by the communist authorities for having sought protection in a capitalist country.

Held: Decision under review affirmed.

The Tribunal found that at the time she left Vietnam, the applicant was no longer under suspicion or regarded adversely for her family background. It noted independent information regarding the current treatment of Catholics in Vietnam and found there was no real chance that the applicant would be persecuted in the reasonably foreseeable future for being Catholic. It found that Vietnamese nationals who had sought protection in other countries did not form a particular social group in Vietnam. Noting that tens of thousands of failed asylum seekers had returned to Vietnam without ill treatment, the Tribunal found there was no real chance that the applicant would be persecuted for reasons of having left legally, overstayed and applied for asylum in a capitalist country. The Tribunal further considered the applicant's claims on cumulative grounds and found that her fears of persecution were not well-founded.

HIGH COURT JUDGMENTS

NAIS & ORS v MIMIA & ANOR

[2005] HCA 77

High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon JJ, S73/2005, 14 December 2005

Immigration - Protection Visa application - where substantial delay between first Tribunal hearing and Tribunal decision - whether delay resulted in real and substantial risk of prejudice to appellants - whether delay by administrative tribunal constitutes denial of procedural fairness or failure to conduct review as required by law - whether decision of administrative tribunal may be set aside following substantial delay - effect of delay on question of assessing appellants' demeanour - whether real and substantial risk that Tribunal's capacity to assess appellants was impaired - jurisdictional error.

This judgment concerned an appeal from a judgment of the Full Federal Court that dismissed an appeal from a judgment of Hely J dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellants were not persons to whom Australia had protection obligations.

The appellants, Bangladeshi nationals, applied to the Tribunal for review in June 1997. In May 1998, the Tribunal conducted a hearing and a further hearing was conducted in December 2001. Written submissions were received from the appellant in March 2002 and the Tribunal decision was delivered in December 2002.

The Tribunal found that the appellants did not have a well-founded fear of persecution for reasons of the appellant parents' mixed religion marriage. In reaching this conclusion the Tribunal found that the appellant parents had fabricated certain claims based on their evidence which was mainly given at the first hearing. In rejecting a claim relating to the appellant daughter the Tribunal referred to the evidence given by the appellant daughter at the second hearing and that she displayed no signs of trauma or concern in talking about the claimed incident.

The Full Federal Court held by majority that the decision was not affected by jurisdictional error. The appellants contended that the Tribunal's gross delay in finalising the matter constituted jurisdictional error.

Held: *per Gleeson CJ, Kirby, Callinan & Heydon JJ (Gummow & Hayne JJ dissenting)* appeal allowed, Tribunal decision quashed and remitted for reconsideration.

per Gleeson CJ, Kirby, Callinan & Heydon JJ

(i) The delay in the decision making process gave rise to jurisdictional error in the form of breach of procedural fairness.

per Gleeson CJ (Kirby J agreeing):

(ii) The delay on the part of the Tribunal in the present case was so extreme that, in the absence of any countervailing considerations in the Tribunal's reasons, it should be inferred there was a real and substantial risk that the Tribunal's capacity to assess the appellants was impaired and the appellants did not have a fair hearing of their claims. As such the decision was flawed for want of procedural fairness.

per Gleeson CJ

(iii) The fact that the impairment resulted from the default of the Tribunal was important. Many events, outside the control and influence of the Tribunal, might occur to make it more difficult to evaluate the claims of an applicant. That does not make the procedure unfair.

per Callinan & Heydon (Kirby J agreeing):

(iv) It could be inferred from the delay that, in the absence of contrary evidence, the Tribunal had deprived itself of its capacity to analyse the oral evidence of the appellants.

(v) The Tribunal decision depended in part on demeanour and credibility. The possibility, even the likelihood, that the Tribunal consulted contemporaneous notes and tape recordings in making its decision was not a satisfactory substitute for the observation and formation of impressions of persons

in the flesh, and the timely personal commitment of these to paper as part of the decision-making process. To delay committing to paper a recollection of evidence, such as the appellant daughter's failure to display signs of trauma while recounting claimed threats, until a long time afterwards runs a real risk of failing to recapture and give effect to matters of subtlety.

- (vi) The relevant delay was not restricted to that which occurred between the second hearing and the giving of the decision because the decision was concerned with demeanour on two occasions, long separated in time, each requiring to be related and compared to the other and weighed with a considerable volume of written evidence.

per Callinan and Heydon JJ

- (vii) A failure to make a quick decision would not, in the context of the *Migration Act* 1958 (the Act), of itself constitute jurisdictional error. However, the presence of s.420 provides an indication of the scope and objects of the Act, and it is a section to which some regard may be had in deciding whether an excessively prolonged decision is one that can be said to have been made fairly. Like trials, hearings conducted by the Tribunal are to be "fair" and "just", according to s.420; and while other language in s.420 is intended to free the Tribunal from constraints applicable to courts, the conferment of freedom in those respects is not to undercut fairness or justice.

per Kirby J:

- (viii) The legislative aspiration of speed in decision-making in s.420 would not, of itself, give rise to remedy for jurisdictional error in the case of default. However, the aspiration of fairness and justice is of a different order. Absent fairness and justice in the performance of its functions and procedures and the decision is invalid as involving jurisdictional error for want of procedural fairness.
- (ix) A special danger of delay in the case of a tribunal is the risk of confusion between the facts of similar applications and elision between impressions about the reliability and truthfulness of witnesses in one case compared with another having common factual and legal features. It is therefore incorrect to suggest that general principles expressed by appellate courts in relation to the effects of delay upon judicial decision-making have no relevance to the consequences of delay for judicial review of decisions of administrative tribunals.

per Gummow J (dissenting)

- (x) The findings of collusion and fabrication in relation to the appellant parents did not turn upon any question of demeanour. The evidence of the appellant daughter did, but this was given at the second hearing about a year before the decision. This was a lengthy interval, but excessive delay of itself does not prove a breach of natural justice. The question is whether it can be inferred the delay has denied a party the opportunity to present its case.
- (xi) There was nothing which required one conclusion in preference to another as to the consequences which followed from the delay. It was not a necessary inference that the Tribunal member was unable as a result of that delay to fulfil his function of reviewing the primary decision or to be fair to the appellants: adopting reasoning of Hill J from the Full Federal Court *NAIS v MIMIA* (2004) 134 FCR 85 at 91.

per Hayne J (dissenting):

- (xii) It was not possible to say when or how the Tribunal made the assessment it did of the evidence the appellants had given and it cannot be said that the Tribunal did not receive the evidence they gave in such a way that their evidence could fairly be assessed. It was not demonstrated that there was a breach of the law which determines the limits and governs the exercise of the repository's power.

FEDERAL COURT JUDGMENTS

Applicants M16 of 2004 v MIMIA & Anor

[2005] FCA 1641

Federal Court of Australia, Gray J, V 542 of 2004, 24 November 2005

Immigration - Protection Visa application - female applicant indicated certain sensitive issues regarding assault by armed Tamil group would be revealed only to a female - Tribunal member was male and other males were present at hearing - whether cultural barriers - Tribunal refused request to make post-hearing written submission - gender guidelines released by Minister to deal with gender-related claims - whether Tribunal failed to afford female applicant proper opportunity to provide further information - denial of procedural fairness.

The applicants, nationals of Sri Lanka, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations. There had been previous judicial proceedings in relation to the same decision which had been dismissed.

The applicants claimed that their house was raided by the armed Tamil group PLOTE and that the pregnant applicant wife was taken into the bedroom by two men who accused her of being a supporter of the Liberation Tigers of Tamil Elam, kicked her in the stomach and warned her that she would be killed if she were seen outside. The applicant wife in the statement accompanying the original application for a protection visa stated "*I shall confess certain secret matters of sensitive issues, if I am called for an interview. I shall prefer a lady case officer to handle my case.*" A medical report by the Victorian Foundation for Survivors of Torture also noted that the applicant wife had other information that she was only prepared to reveal to a female case officer.

At the hearing, the Tribunal did not ask the applicant wife any questions about the incident with PLOTE, nor did he ask her about her statement in the medical report. The Tribunal did not ask her if she had any further information which she had not divulged to the Tribunal. The Tribunal refused a request by the applicants' adviser to make a post-hearing written submission on the basis that nothing new had arisen at the hearing, that two written submissions had already been lodged and there had been three hours of hearing.

The Tribunal was satisfied that the PLOTE members assaulted the applicants but did not accept that it was for a Convention reason but because they refused to bow to demands to use their motorbike. The Tribunal was satisfied that the assault was an isolated incident motivated by anger or revenge and that there was not a real chance that the applicants faced persecution for a Convention reason if they returned to Vavuniya.

The applicant wife filed an affidavit before the Court setting out additional information regarding the incident with PLOTE. She claimed that because the Tribunal member was male and there were men present at the hearing, that she did not disclose the additional information to the Tribunal because of cultural barriers as a Tamil female.

Held: Tribunal decision quashed and matter remitted for reconsideration.

- (i) The Tribunal failed to afford the applicant wife a proper opportunity to provide further information, when the Tribunal was aware she was capable of providing information that might have been relevant to her claim. It should have been obvious to the Tribunal that there were gender-specific issues about which the applicant wife could speak if given a proper opportunity. Accordingly, the Tribunal denied the applicant wife procedural fairness and failed to provide a hearing that accorded with its statutory obligation. It could not be said that the denial of procedural fairness made no difference to the outcome.
- (ii) The Tribunal did not make the obvious suggestion that if the applicant husband and the male migration officer were to leave the hearing room, she might be able to reveal the other information to the Tribunal through the female interpreter. Alternatively, it would have been relatively easy for the Tribunal to have acceded to the advisor's request for the opportunity to make written submissions, suggesting that arrangements might be made for the applicant wife to say in writing anything more that she wished to say about the incident with PLOTE.

- (iii) The Tribunal ignored gender guidelines released by the Minister to deal with gender-related claims by asylum seekers. In effect, the Tribunal stands in the shoes of the Minister's delegate, when it exercises its function of reviewing a decision of such a delegate. It would be anomalous, if not offensive to suggest that the Tribunal could ignore guidelines prepared for the benefit of officers of the Department when exercising powers as delegates of the Minister under s.415(1) of the *Migration Act 1958*.

VWVY v MIMIA

[2005] FCA 1723

Federal Court of Australia, Finkelstein J, VID 402 of 2005, 2 December 2005

Immigration - Protection Visa application - use of interpreter - role of interpreter - standard of interpretation - whether Tribunal provided fair and just hearing.

This was an appeal from a judgment of the Federal Magistrates Court (FMC) dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant was not a person to whom Australia had protection obligations.

The appellant, a citizen of Burma, claimed to fear persecution on account of his religious and political beliefs. The Tribunal found difficulty with the appellant's evidence and largely rejected his account of events. The delegate's decision was affirmed on this basis. The Tribunal's findings followed a hearing at which the appellant had given extensive evidence with the assistance of an interpreter who had been retained by the Tribunal to assist him in the presentation of his case. The interpreter was not accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) but had some experience with Tribunal hearings.

Before the FMC the appellant contended, amongst other things, that he had been denied procedural fairness because of the inadequate interpretation of the proceedings by the interpreter. The FMC rejected this argument on the basis that there was no evidence that the appellant had difficulty in understanding the interpreter or that his answers, as interpreted, were incorrect.

The appellant pressed the procedural fairness ground on appeal before the Federal Court.

Held: Tribunal decision quashed and remitted for reconsideration according to law.

- (i) A combination of insufficient translations as well as clear factual errors on the part of the interpreter suggested that the applicant had no real opportunity to express himself and fully answer questions put to him by the Tribunal. No one error or deficiency was so severe as to show that the interpreter or the interpretation was of such poor quality that the applicant was effectively deprived of his right to appear but when looking at the hearing as a whole, the applicant did not receive a fair hearing.
- (ii) When the Tribunal has before it a putative refugee who does not speak English it is required to ensure that an interpreter is present. Without an interpreter an applicant would effectively be stripped of his or her rights to appear and give evidence. The use of the term "may" in s.427(7) of the *Migration Act 1958* (the Act) does not suggest that the Tribunal has a discretion to appoint an interpreter but should be understood as the grant of authority to appoint an interpreter.
- (iii) The requirement that there be an interpreter under s.427(7) of the Act imposes an obligation on the Tribunal to appoint an interpreter with sufficient skills to fulfil the function.
- (iv) The Tribunal failed to achieve its objective of providing a fair and just hearing.

FEDERAL MAGISTRATES COURT JUDGMENTS

MZWRJ v MIMIA & Anor

[2005] FMCA 752

Federal Magistrates Court of Australia, O'Dwyer FM, MLG 1251 of 2004, 7 October 2005

Immigration - Protection Visa application - inadequacy of interpreter - whether Tribunal's reasoning and findings infected by inadequate interpreting - whether denial of applicant's right to be properly heard - whether decision made without jurisdiction.

The applicant, a national of China, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia owed protection obligations. He claimed that he feared persecution because of his conversion to the beliefs and practices of Falun Gong which he had adopted whilst in Australia.

The Tribunal found that the applicant had engaged in Falun Gong in Australia for the purposes of strengthening his claim to be a refugee and accordingly disregarded that conduct for the purposes of his protection visa application consistently with s.91R(3) of the *Migration Act* 1958. The Tribunal found that the applicant was not a genuine Falun Gong practitioner, would not in fact practice on his return and would not suffer persecution.

Before the Court, the applicant contended that the Tribunal's recitation of the evidence given at the hearing, at which he was unrepresented, did not adequately reflect the evidence actually given. The applicant claimed that although he did join Falun Gong in Australia with the clear intention of assisting his application for refugee status, his involvement led to a genuine conversion to Falun Gong. He contended that through the poor interpretation, his admission about his initial motivation lost the context in which it was made and infected the Tribunal's reasoning and ultimate findings.

The applicant contended that the Tribunal accordingly breached the provisions of s.425 of the *Migration Act* 1958.

Held: Tribunal decision set aside and remitted for determination according to law.

- (i) The Tribunal made its decision without jurisdiction because of the inadequacy of the interpretation service relied on by the Tribunal.
- (ii) The evidence clearly identified significant shortcomings in the interpretation of the proceedings before the Tribunal which amounted to a denial of the applicant's right to be properly heard and caused the Tribunal to make findings that had the interpretation been more accurate, might very well have been different.
- (iii) The interpretation available to the Tribunal did not explain what the applicant was saying and, as a consequence, the Tribunal's decision was based only upon the inadequate information it had before it. It was the cumulative effect of these inadequacies, in the context of the issue in the mind of the Tribunal as to the genuineness of the applicant, that infected the Tribunal's capacity to properly understand what the applicant actually said and what he was actually postulating.

VWRT v MIMIA & Anor

[2005] FMCA 1816

Federal Magistrates Court of Australia, McInnis FM, MLG 150 of 2005, 7 December 2005

Immigration - Protection Visa application - whether Tribunal failed to consider essential integer of applicant's claims - whether failure to make finding relating to particular social group - whether jurisdictional error.

The applicant, a national of India, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his Muslim religion, Indian ethnicity and relationship with a Hindu woman.

The applicant was from a Muslim minority community otherwise dominated by Hindus. He was in a relationship with a Hindu woman and feared persecution by her family, particularly her brother, who disapproved of the relationship. The applicant claimed that the woman's brother, a violent Hindu extremist and supporter of the Hindu Nationalist BJP, assaulted him and threatened to kill him if he ever saw the woman again. The applicant feared that the authorities would not protect him because he was Muslim.

The Tribunal accepted that the applicant feared the woman's brother who was a violent criminal but was not satisfied that the essential and significant reason for the harm feared was one of the claimed Convention grounds being, membership of a particular social group comprising people in an inter-caste relationship, religion, ethnicity or political opinion. In addition, the Tribunal was not satisfied that the applicant would be denied state protection for reason of his religion.

The applicant contended that the Tribunal erred by simply referring to the woman's brother as a criminal and characterising the dispute as an inter-family dispute. He contended that by failing to consider that the brother was a Hindu nationalist, the Tribunal failed to consider an integer of the applicant's claims. In addition, the applicant contended that the Tribunal failed to consider whether he was a member of a particular social group comprising Indian Muslims involved in inter-religious relationships.

Held: Tribunal decision set aside and remitted for reconsideration.

- (i) The Tribunal erred by failing to consider an integer of the applicant's claims and the existence of a particular social group raised squarely in the material before it. These failures amounted to jurisdictional error.
- (ii) The Tribunal failed to consider an integer of the applicant's claims, namely the woman's brother's political affiliation with the Hindu Nationalist BJP. It was that affiliation combined with the background finding of the applicant being Muslim in a minority Muslim community otherwise dominated by a Hindu population, that constituted the failure. Although the Tribunal made findings which confined the fear of the brother to his criminality, it was clear from the material before the Tribunal that it was not simply the criminality which was relied upon but rather the criminality combined with the political association of the brother.
- (iii) A proper reading of the material before the Tribunal fairly raised, or in the alternative by inference raised, sufficient identification of a particular social group to be characterised as a person involved in an inter-religious relationship, being a Muslim involved in a relationship with a Hindu.

Legislative developments of relevance to the work of the Refugee Review Tribunal are noted below

▶ Legislation passed

Migration and Ombudsman Legislation Amendment Act 2005

The *Migration and Ombudsman Legislation Amendment Act 2005* (the Act) was introduced into the Senate on 15 September 2005. The Act was passed by the Senate on 13 October 2005 and on the same day introduced into the House of Representatives (House). The Act was passed by the House on 30 November 2005. The Act received Royal Assent on 12 December 2005.

The Act commenced on 12 December 2005, amending the *Migration Act 1958* by:

- establishing 90 day time limits for the making of protection visa application decisions by the Minister for Immigration and Multicultural and Indigenous Affairs and the review of those decisions by the Refugee Review Tribunal;
- permitting the disclosure of personal identifiers to individuals or the public to assist with identifying or locating a person in connection with the administration of the Act;
- requiring the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs and the Principal Member of the Tribunal to report to the Minister about protection visa applications and review applications that take longer than 90 days to decided;
- introducing measures to support and facilitate the Commonwealth Ombudsman's enhanced role in immigration and detention matters.

A copy of the Act can be found at:

[http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/8F1796DAD7E6E0F0CA2570D9001B090E/\\$file/141-2005.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/8F1796DAD7E6E0F0CA2570D9001B090E/$file/141-2005.pdf)

Anti-Terrorism Act (No. 2) 2005

The *Anti-Terrorism Act 2005* (the Act) was introduced into the House of Representatives (House) on 3 November 2005 and passed by the House on 29 November 2005. The Act was introduced into the Senate on 30 November 2005 and passed by the Senate on 06 December 2005. The Act received Royal Assent on 14 December 2005.

The Act commenced on 14 December 2005, amending the Division 9 provisions concerning the definition of "security" in relation to the deportation of non-citizens and those convicted of an offence against Division 80 of the *Criminal Code*. It also extends the definition of a terrorist organisation to enable listing of organisations that advocate terrorism and introduces a new notice to produce regime to ensure the Australian Federal Police is able to enforce compliance with lawful requests for information that will facilitate the investigation of a terrorist act or other serious offence.

A copy of the Act can be found at:

<http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/all/search/9249AE71DF443FDFCA2570D80024D5A0>



Regulations made

Migration Amendment Regulations 2005 (No. 11) (SLI 317 of 2005)

The *Migration Amendment Regulations 2005 (No. 11) (SLI 317 of 2005)* were made on 15 December 2005 and commenced on 20 December 2005. Regulation 2.06AA in Division 2.1 of Schedule 1 was inserted into the Migration Regulations 1994 (the Regulations) and it prescribes the circumstances and days on which the 90 day period starts for the purposes of subsection 65A(1) and subsection 91Y(10) of the *Migration Act 1958* which were inserted by the *Migration and Ombudsman Legislation Amendment Act 2005* (the Act).

Subsection 65A(1) of the Act provides that regulations may prescribe the circumstances in which the 90 day period within which the Minister must make a decision on an application for a protection visa will start. Subsection 91Y(10) of the Act provides that the “decision period” for the purposes of section 91Y means the period of 90 days starting either on the day on which the application for the protection visa was made or, in the circumstances prescribed in the regulations, on the day prescribed.

The new regulation provides that in the case of an applicant for a protection visa who already holds a certain temporary protection or humanitarian visa, the 90 day period for making a decision commences once the applicant has held his or her current visa for a specified period. The specified period would vary according to the visa class, reflecting the existing criteria in the Regulations.

A copy of the regulations can be found at

[http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A72EB9FD5D3B4A7ACA2570D8000E7208/\\$file/0512759A-051024EV.doc](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A72EB9FD5D3B4A7ACA2570D8000E7208/$file/0512759A-051024EV.doc)

CASELOAD OVERVIEW

RRT Decisions – December 2005

Country	Primary decision affirmed	Primary decision set aside	No jurisdiction	Withdrawn	Other	Total
Afghanistan	0	4	0	0	0	4
Albania	1	2	0	0	0	3
Algeria	3	0	0	0	0	3
Azerbaijan	0	1	0	0	0	1
Bangladesh	8	0	3	0	0	11
Brazil	1	0	0	0	0	1
Burma (Myanmar)	1	1	2	0	0	4
Burundi	0	1	0	0	0	1
China (PRC)	88	13	3	1	0	105
Colombia	1	0	0	0	0	1
Congo Democratic Republic of	0	1	0	0	0	1
Egypt	2	3	0	0	0	5
Ethiopia	0	1	0	0	0	1
Fiji	1	0	0	0	0	1
FYROM	1	0	0	0	0	1
India	21	1	0	0	0	22
Indonesia	18	2	1	0	0	21
Iran	0	3	1	0	0	4
Iraq	0	6	0	0	0	6
Israel	0	1	0	0	0	1
Jordan	1	1	0	1	0	3
Kenya	1	1	0	0	0	2
Kyrgyzstan	1	0	0	0	0	1
Lebanon	4	1	0	0	0	5
Malaysia	25	0	0	0	0	25
Moldova	2	0	0	0	0	2
Mongolia	1	0	0	0	0	1
Nepal	1	3	0	0	0	4
Nigeria	6	1	0	0	0	7
North Korea	1	0	0	0	0	1
Pakistan	8	1	0	0	0	9
Palestinian Terr (W Bank/gaza)	2	0	0	0	0	2
Peru	2	0	0	0	0	2
Philippines	6	0	0	0	0	6
Romania	3	0	0	0	0	3
Russian Federation	2	1	0	0	0	3

South Africa	1	0	0	0	0	1
South Korea	6	0	0	0	0	6
Sri Lanka	10	11	0	0	0	21
Sudan	0	1	0	0	0	1
Syria	0	1	0	0	0	1
Thailand	1	0	0	1	0	2
Turkey	1	3	0	0	0	4
Ukraine	2	1	0	0	0	3
Uruguay	1	0	0	0	0	1
Vietnam	3	1	0	0	0	4

ACCESSING TRIBUNAL DECISIONS

Access on Tribunal Premises

Access to published decisions of the Refugee Review Tribunal can be obtained from the Sydney and Melbourne Registries of the Tribunal.

The Sydney Registry is located at: Level 11
83 Clarence St
Sydney NSW 2000

The Melbourne Registry is located at: Level 12
460 Lonsdale St
Melbourne VIC 3000

Access via the Internet

A selection of Tribunal decisions is also currently available on the Refugee Review Tribunal's World Wide Web site located at <http://www.rrt.gov.au>.

The web site also contains information about how to apply to the Tribunal, how the Tribunal is organised, the function of the Tribunal and what it aims to achieve, caseload statistics, as well as copies of this and previous RRT Bulletins.

The RRT web site is updated on a regular basis.

The Tribunal's Email address is: rrtinfo@rrt.gov.au

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